

U.S. SUPREME COURT UPHOLDS ARIZONA'S E-VERIFY LAW AND PENALTY PROVISIONS FOR EMPLOYING UNAUTHORIZED WORKERS

Insights
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On May 26, 2011, the U.S. Supreme Court upheld Arizona's 2007 immigration law that requires all employers to use E-Verify for all new hires and permits the revocation of a company's business license as a penalty for employing unauthorized workers. This decision resulted from a challenge to the Legal Arizona Workers Act of 2007, not to be confused with the 2010 controversial Arizona "Support Our Law Enforcement and Safe Neighborhoods Act."

The Legal Arizona Workers Act

In July 2007, Arizona enacted the Legal Arizona Workers Act, which prohibits Arizona employers from knowingly or intentionally employing individuals unauthorized to work in the U.S. Under the Act, any person may submit a complaint alleging that an employer employs unauthorized workers. Once the complaint is investigated and determined not to be false, the state will initiate legal action against the employer. During the court proceeding, the state is limited to the federal government's determination of the employee's lawful status. If the employer is found to have knowingly or intentionally hired a person unauthorized to work in the U.S., the Act permits the court to impose various penalties including the suspension of its license to operate a business in the state of Arizona. The Act defines a license to include any agency permit, certificate, approval, registration, charter, or similar form of authorization, foundational documents, articles of incorporation, and certificates of partnership.

The Act also requires all employers in Arizona to use the federal E-Verify system to verify the employment eligibility for all new hires. Interestingly the Act does not provide any penalties for failing to use E-Verify but it does provide a safe-harbor.

Legal Challenge

After the Act was passed in 2007, a group of business organizations, including the U.S. Chamber of Commerce, filed a complaint in Federal Court challenging the Act on the grounds that the Act was expressly preempted by federal law, specifically the Immigration Reform and Control Act of 1986 ("IRCA"). The challengers alleged that the penalty of revocation of an employer's business license was **expressly** preempted and the provision requiring the use of E-Verify was **impliedly** preempted by IRCA.

Congress passed IRCA to regulate the employment of unauthorized workers in the U.S. and requires employers to complete and retain a Form I-9 for each employee. During the I-9 form process, an employer must review original documentation to determine the identity and employment eligibility for all new hires. IRCA provides for civil and criminal penalties for employers who violate the requirements. IRCA preempts any state or local law imposing civil or criminal sanctions *other than through licensing and similar laws*. Therefore, IRCA was designed to provide the exclusive remedy for employing unauthorized workers, but carves out the option for states to impose sanctions regarding licensing and similar laws.

The lower court held that IRCA did not expressly preempt the Act, because the Act falls within the exception allowing states to implement licensing laws. The lower court also held that the Act's provision mandating the use of E-Verify was not inconsistent with federal policy, and thus was not impliedly preempted.

The business organizations appealed the federal district court's ruling to the 9th Circuit Court of Appeals. The 9th Circuit upheld the lower court's ruling and the case was subsequently appealed to the U.S. Supreme Court.

U.S. Supreme Court Decision – Chamber of Commerce of the U.S. vs. Whiting

In a 5-3 decision, the Supreme Court upheld the 9th Circuit decision that federal law does not preempt the Legal Arizona Workers Act. The Court held that "Arizona's licensing law falls within the confines of the authority Congress chose to leave to the States and therefore is not expressly preempted." The Court also determined that federal law does not impliedly preempt the mandatory use of E-Verify requirement. The Court reasoned that although Congress had made the program voluntary at the national level it had expressed no intent to prevent states from mandating participation.

Implications for Employers

Arizona employers should ensure that they are in compliance with the Legal Arizona Workers Act including the use of the E-Verify system to confirm the employment eligibility for all new hires.

Arizona employers in violation of this law will face serious penalties. If found to have violated the provision regarding knowingly employing an unauthorized worker, the employer will be ordered to terminate the employment of all unauthorized workers and file quarterly reports on all new hires for a probationary period of three years. For an initial violation of the Act, the employer may also have its business license suspended for a period not to exceed 10 business days. A second knowing violation will result in the permanent revocation of the employer's business license for the location where the unauthorized worker performed work.

For the first intentional violation, the employer will be required to terminate all unauthorized workers, file quarterly reports on all new hires for a probationary period of five years, and have its business license suspended for a minimum of 10 days. A second intentional violation requires the permanent revocation of all business licenses. For knowing and intentional violations, it is considered a second violation if it occurs at the same business location as the first violation, during the employer's probationary period.

In light of these potential sanctions, Arizona employers can take steps to avoid or reduce the risk of enforcement action.

- First, ensure you are enrolled and participating in E-Verify and are in compliance with the requirement for use of the system.
- Second, implement or re-issue policies confirming your compliance with U.S. immigration laws and the Legal Arizona Workers Act.
- Third, take the time to make certain your I-9 forms are properly completed.

This case has implications for employers outside of Arizona. Already, states are adopting similar legislation and we expect to see an increase in the number of states that mandate the use of E-Verify. Employers, especially those operating in multiple states, should ensure they are familiar with and complying with state specific immigration laws.

For more information, please contact a member of our Global Immigration Group.

This Supreme Court Alert presents an overview of a particular decision. It is not intended to be, and should not be construed as, legal advice for any specific fact situation.